Supreme Court, U.S.
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No. 98-1908

IN THE

Supreme Court of the United States

PROFESSIONAL DIVERS OF NEW ORLEANS,

Petitioner,

v.

DOUGLAS WISNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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I

STATEMENT OF THE CASE

Throughout the appellate proceedings, including the writ application to this Honorable Court, Petitioner, Professional Divers of New Orleans ("PDNO"), has repeatedly distorted the facts of this case by exclusively focusing on the events of January 16, 1994, which took place on a fixed Exxon platform. Accordingly, Respondent, Douglas Wisner ("Wisner") offers the following recitation of the facts.

Wisner was injured in the course and scope of his employment with PDNO. (Pet. App. at p. 33, PDNO Memorandum in Support of Summary Judgment). Wisner worked for PDNO from November 1992 until shortly after an incident in January 1994. (Pet. App. at p. 46, affidavit of Larry Tomlinson). As PDNO pointed out in support of its summary judgment, PDNO's diving "records indicate that Wisner worked approximately 10% of his time on a fixed platform, while spending approximately 90% of his time working off of vessels during his employment with Professional Divers." (Pet. App. at pp. 39-40, PDNO Memorandum in Support of Summary Judgment). During this time, Wisner worked on approximately 14 different vessels owned by 12 different companies at the direction of his employer, PDNO. (Pet. App. at p. 40, PDNO Memorandum in Support of Summary Judgment). In Wisner's deposition, he testified that with regard to his vessel related employment, the vessel served as his work platform and provided his room and board. (Pet. App. at pp. 89 & 91, Deposition of Douglas Wisner). As such, with respect to each individual job, it can be said that Wisner was assigned by his employer, PDNO, to the vessel in question.

During Wisner's tenure with PDNO, during which PDNO has admitted that Wisner spent 90% of his time working on vessels, it has been alleged that PDNO's diving, safety and decompression procedures were inadequate and that as a result of these inadequate procedures, *Respondent was exposed to multiple negligent events during the overall course of his employment with PDNO which individually, severally and/or cumulatively, resulted in injury to Respondent.* (Plaintiff's First Supplemental and Amending Petition at ¶7). Although the final cumulation of these events occurred on January 16, 1994, the day after Wisner dove from an Exxon platform, PDNO's continuing negligence, which caused Wisner's injury, is alleged to have occurred over a period of time immediately predating the incident on the Exxon platform and during which Wisner was diving from vessels. (Pet. App. at p. 34, PDNO Memorandum in Support of Summary Judgment).

REASONS FOR DENYING THE WRIT

In light of the facts of this case, PDNO's phrasing of the question presented to this court is also factually misleading. A more appropriate statement of the question presented is:

> Can a purely maritime employee who is assigned by his employer to vessels, necessary for the performance of the employee's duties but owned/chartered by the employer's customers, be considered a Jones Act seaman.

I.

SEAMAN STATUS

The test for seaman status can presently be summarized as follows:

1. The worker's duties must contribute to the function of the vessel or to the accomplishment of its mission; and

2. The worker must have a connection to a vessel in navigation, or to an identifiable group of such vessels, that is substantial in terms of both duration and nature.

Chandris, Inc. v. Latsis, 515 U.S. 347, 115 S. Ct. 2172, 2190, 132 L. Ed. 2d 314 (1995); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 111 S. Ct. 807, 112 L. Ed. 2d 866 (1991). The present dispute revolves around the second prong of this test and Wisner's connection to an identifiable group of vessels.

II.

THE LOUISIANA SUPREME COURT CORRECTLY FOUND WISNER TO BE A JONES ACT SEAMAN

In the underlying case, the Louisiana Supreme Court correctly focused, not on the specific wording of the above quoted test for seaman status, but rather on the underlying principals that form the clearly articulated and well reasoned foundation for this Court's determination of seaman status. Although a seaman's connection to a vessel in navigation,

or to a group of such vessels, must be substantial in terms of both duration and nature; the purpose of this requirement is to ensure Jones Act coverage to true seamen, while precluding such coverage to land-based workers who have only a transitory or sporadic connection to a vessel in navigation and, therefore, whose employment does not regularly expose them to the perils of the sea. *Wisner v. Professional Divers of New Orleans*, 98-C-1755 at pp. 4-5 (La. 03/02/99) (citing *Chandris*, 115 S. Ct. at 2190).

In analyzing the underlying jurisprudence, The Louisiana Supreme Court recognized that

> [t]he *Chandris* court poignantly stated that in defining the prerequisites for Jones Act coverage, one should focus upon the essence of what it means to be a seaman rather than allowing jurisprudential tests to obscure such a finding. In so doing, the *Chandris* court recommended that the total circumstances of an individual's employment be considered, as the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

Wisner, 98-C-1755 at p. 5 (citing *Chandris*, 115 S. Ct. at 2190-91). Thus the Louisiana Supreme Court correctly concluded that

> *Papai* and *Chandris* dictate that when we determine whether the nature of Wisner's connection to vessels in navigation is substantial, we should focus on whether Wisner's duties were

> primarily sea-based activities. . . . In both cases, the Supreme Court emphasized that the purpose of the substantial connection test is to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks.

Wisner, 98-C-1755 at pp. 5-6 (citations omitted) (citing *Harbor Tug & Barge Co. v. Papai*, __ U.S. __, 117 S. Ct. 1535, 1540, 137 L. Ed. 2d 800 (1997); *Chandris*, 115 S. Ct. at 2190-91). It is not the fortuity of one's tenure on various vessels that should be controlling. The Court concluded by stating that

> the formulations or "tests" employed by the various courts are simply different ways to arrive at the same basic point: the Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to "the special hazards and disadvantages to which they who go to sea in ships are subjected."

Wisner, 98-C-1755 at p. 6 (citing *Chandris*, 115 S. Ct. at 2190).

Moreover, the Louisiana Supreme Court also recognized the inherent inequity that exists when employers, such as PDNO, who depend completely on the use of vessels for their work, rely on their customers for the provision of those vessels. The court stated:

> Jones Act coverage should not be withheld . . . when claimants are continuously subjected to the perils of the sea and engaged in classical

> seaman's work. The Fifth Circuit specifically held that, in light of the purposes of the Jones Act, employers will not be allowed to deny Jones Act coverage to seamen by arrangements with third parties regarding a vessel's operation or by the manner in which work is assigned.

Wisner, 98-C-1755 at p. 4 (citations omitted). *See also Folse v. Western Atlas International, Inc.*, 593 So. 2d 341 (La. 1992).

Furthermore, the Louisiana Supreme Court acknowledged that a commercial diver is the quintessential vessel. When a diver is engaged in a dive in navigable waters, he is navigating the waters as any other Jones Act vessel would. Therefore, the Louisiana Supreme Court stated:

> A diver's work *necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land. It is not, like so many offshore field occupations, an art developed in land work and transposed to a maritime setting. Oil field divers who regularly spend days or weeks at a time working, eating, and sleeping on vessels are exposed to the same hazards as other seamen. Moreover, when a diver descends from the surface, braving darkness, temperature, lack of oxygen, and high pressures, he embarks on a marine voyage in which his body is now the vessel. Before he can complete his assigned task, he must successfully navigate the seas. *Wallace v. Oceaneering Int'l*, 727 F.2d at 436. (citations omitted)

Wisner, 98-C-1755 at p. 4 (emphasis and citation as in original).

Finally, the Louisiana Supreme Court recognized that in the present case they were called upon to answer a question that this Court and the United States Fifth Circuit had left for another day — whether an employee hired to perform seagoing work, and who does his work on short voyages aboard a large number of vessels during the employment in question, is a seaman. *Wisner*, 98-C-1755, Calogero, C.J. concurring (citing *Papai*, 117 S. Ct. at 1540), and Knoll, J. concurring (citing *Papai*, 117 S. Ct. at 1540; *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986)).

Thus, after considering the totality of the circumstances, the Louisiana Supreme Court concluded that Douglas Wisner was a seaman based on the following facts:

1. Wisner's work as a commercial diver placed him on vessels for ninety percent of his work life with PDNO; and

2. Wisner's employment as a commercial diver for PDNO was inherently maritime, exposing him regularly to the perils of the sea.

Wisner, 98-C-1755 at p. 6

III.

HARBOR TUG & BARGE CO. v. PAPAI & THE IDENTIFIABLE GROUP OF VESSELS REQUIREMENT

Petitioner complains that the Louisiana Supreme Court's decision in *Wisner* "abrogates" *Papai.* However, this assertion is based on petitioner's mischaracterization of the *Wisner* court's reasoning. Nevertheless, even if this Court were to disagree with the reasoning of the Louisiana Supreme Court, Wisner would still qualify as a seaman pursuant to jurisprudence that remained unaffected by *Harbor Tug & Barge Co. v. Papai*, __ U.S. __, 117 S. Ct. 1535, 137 L. Ed. 2d 800 (1997).

In *Papai*, this Court again reaffirmed the test for seaman status last espoused in *Chandris*, and stated that with regard to determining whether an employee has a connection to an identifiable group of vessels, some element of common ownership ***or*** control by the employer is required. *Papai*, 117 S. Ct. at 1542. *Papai*, involved an employee who attempted to satisfy the common ownership and/or control element by creating a nexus between his union hall, which did not employ him or engage in any job and/or vessel assignments, and various independent employers, each of whom entered into individual employment contracts with the employee and made their own individual and independent job and vessel assignments. ***Papai*, did not** involve a situation, as in the present case, where **a single employer**, for which the use of vessels is an integral component of its business and the employee's duties, **assigned its own employee** to multiple vessels for vessel related jobs.

In *Papai*, the employee sought to have the court consider his employment with those multiple, independent employers, using the union hall as a common link, to establish that he was employed in the service of an identifiable fleet of vessels and therefore a seaman as to his current employer. *Papai*, 117 S. Ct. at 1542. The primary focus of this Court in *Papai* was whether Papai could rely on work done on vessels for multiple employers, pursuant to individual employment contracts with each employer, without any showing of common ownership **or** control as to the vessels. *Cabral v. Healy Tibbits Builders, Inc.*, 118 F.3d 1363, *as amended on denial of rehearing*, 128 F.3d 1289 (9th Cir. 1997), *cert denied*, 118 S. Ct. 1827 (1998). This Court rejected the notion that one could rely on work done for ***multiple employers*** to satisfy the Jones Act's status and fleet requirements with regard to any individual employer and instead focused on Papai's employment relationship with his employer at the time of his accident. *Papai*, 117 S. Ct. at 1541-42. The mere fact that various employers employed employees through a common hiring hall could not provide the nexus necessary to satisfy the requirement of common ownership or control of a group of otherwise unrelated vessels. *Papai*, 117 S. Ct. at 1541.

However, *Papai* is distinguishable from the present case in that *Papai* involves a worker who was employed through a union hall, which merely provided a readily available pool of laborers and played no role in job and/or vessel assignment, by multiple random vessel owners, each of which entered into their own separate employment contract and made their own independent vessel and job assignments. In the present case, Wisner was employed by PDNO as a commercial diver and assigned by his employer, PDNO, to vessels owned by PDNO's customers and essential to

PDNO's business and Wisner's duties. Unlike *Papai*, where the plaintiff had entered into various employment contracts with various vessel owners, Wisner has a single employment relationship with an employer that assigned him to multiple vessels in furtherance of said employer's business.

The requirement of common ownership **or** control expressed in *Papai* is not inconsistent with prior jurisprudence allowing these elements to be satisfied upon a showing that the employer requires the use of vessels in the rendition of services and that the employer relies on its customers to provide said vessels rather than own or charter said vessels themselves. *See, e.g., Folse v. Western Atlas International, Inc.*, 593 So. 2d 341 (La. 1992); *Miller v. International Diving and Consulting Services, Inc.*, 95-873 (La. App. 5th Cir. 2/14/96); 669 So. 2d 1246; and *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237, 1240 (5th Cir. 1986). The present case is similar to that found in *Folse*, *Miller*, and *Pickle*, which were all decided after *Barrett v. Chevron USA, Inc.*, 781 F.2d 1067 (5th Cir. 1986), which required a fleet to consist of "an identifiable group of vessels acting together or under one control." *Barrett*, 781 F.2d at 1074.

The Louisiana Supreme Court and Fifth Circuit have consistently held that where an employer assigns its employees to various vessels that are owned by its customers in furtherance of the employers business, the customer's vessels will constitute an identifiable group of vessels acting together or under one control. *See Folse*, 593 So. 2d 341; *Pickle*, 791 F.2d 1237; and *Wallace*, 727 F.2d 427. It is the individual employer's need for the use of a vessel in furtherance of its business and assignment of its employees to said vessels that provides the common nexus necessary

to satisfy the requirement of common control that is missing in cases such as *Papai*. *See, e.g.*, *Folse*, 593 So. 2d at 343. As a matter of law, an employer cannot deprive its employees of seaman status simply through business arrangements with its customers. *Folse*, 593 So. 2d at 342.

In *Folse*, the court discussed the identifiable group of vessels requirement in the context of an employer who relied on its customers for the furnishing of vessels necessary for the completion of the work that was to be performed. The *Folse* court held that when an employer utilizes its customers' vessels, in lieu of owning or chartering its own, the customers' vessels constitute a fleet. *Folse*, 593 So. 2d at 342 (*citing Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 974 (1984)). In situations such as *Folse* and the present case, where an employer's business requires the use of vessels and the employer chooses to rely on its customers to supply said vessels rather than own or charter said vessels themselves, the courts have treated the employer as the defacto owner/charterer. As a matter of law, an employer cannot deprive its employees of seaman's status simply through business arrangements with its customers. *Folse*, 593 So. 2d at 342.

In *Folse*, the plaintiff's employer provided wireline services to its customers from the customers' vessels. Although the employer in *Folse* never owned or chartered any of the vessels from which its employees worked, it did depend on its customers' vessels to provide its employees with the living quarters and work platforms essential to the accomplishment of its business. Consequently, the *Folse* court determined that the customers' vessels constituted an identifiable fleet (i.e. an identifiable group of vessels under common control).

In the present case, Wisner has alleged injury not only as a result of his last dive from an Exxon platform, but also as a result of previous dives from vessels. Wisner was assigned by PDNO to all of the vessels from which he dove. Moreover, and as in *Folse*, PDNO required said vessels in furtherance of its business and as a necessary component of Wisner's employment. For those jobs from which Wisner dove from a vessel, said vessel was a necessary component of his job, without which he could not have completed his job and PDNO would have been required to provide its own vessel. In the present case, it is the individual employer's need for the vessel in furtherance of its business that provides the common nexus necessary to satisfy the requirement of common ownership or control that is missing in cases such as *Papai*, which involve multiple employment relationships of varying significance with numerous vessels owned by several employers.

As in *Folse*, the situation presented in the present case requires a finding that the vessels from which Wisner worked and upon which he is alleged to have suffered injury be treated as an identifiable fleet. Although PDNO did not own or charter the vessels on which Wisner worked and was injured, they did require and rely upon those vessels for the provision of work platforms and living quarters. Consequently, as in *Folse*, PDNO cannot be allowed to deprive Wisner of seaman status based on its business decision to use its customers' boats.

Finally, the overriding concern expressed by this Court in *Papai* was the importance of "the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act . . . before a particular work day begins." *Papai*, 117 S. Ct. at 1541 (*citing Chandris*,115 S. Ct. at 2187). To this extent, this Court stated:

> The fundamental purpose of th[e] . . . substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.

Papai, 117 S. Ct. at 1540 (citing *Chandris*, 115 S. Ct. at 2190) (modifications as in original); *Wisner*, 98-C-1755 at p. 5. "For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea." *Papai*, 117 S. Ct. at 1540; *Wisner*, 98-C-1755 at p. 5.

Therefore, the Louisiana Supreme Court's conclusion in the present case that Douglas Wisner is a Jones Act seaman is clearly consistent with this Court's prior decisions regarding seaman status and is in complete accord with the established notions that employees and employers depend upon concerning the predictability of Jones Act coverage. After all, Wisner, as a commercial diver, was a sea-based employee who was regularly exposed to the perils of the sea during voyages upon vessel's to which he was assigned by his employer, PDNO. *Papai*, on the other hand, only had sporadic connections to his employer's vessel and was never exposed to the perils of the sea during voyages. Unlike Wisner, whose employment is clearly sea-based, *Papai's* entire work history with his employer was clearly shore-based.

CONCLUSION

In conclusion, Wisner is a Jones Act seaman. Wisner has claimed injury over a period of time during which he was assigned by his employer, PDNO, to various vessels owned by PDNO's customers. Since these vessels were necessary for the performance of PDNO's business, PDNO exercised the requisite degree of common control necessary to satisfy the requirements of *Papai*. Because *Papai* is clearly distinguishable on its facts, and should be so limited, reliance on *Papai* by the trial court and court of appeals was unfounded, as *Papai* did not effect a change in prior jurisprudence. Therefore, it was proper for the Louisiana Supreme Court to reverse the lower courts and conclude that Wisner is a Jones Act seaman.

Wherefore, considering the foregoing, Respondent, Douglas Wisner, prays that this honorable court deny PDNO's application for writ of certiorari.

Respectfully submitted,

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